

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

NORMAN T. MERKEL,

Plaintiff,

vs.

No. CIV 03-1312 JB/WDS

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Plaintiff's Motion for Continuance of Hearing, filed July 2, 2004 (Doc. 20). The issue is whether the Court should vacate the hearing set on two of the Defendant United States of America's motions. Because the Plaintiff, Norman T. Merkel, has shown good cause for moving the hearing, the Court will grant Merkel's motion and reset the hearing for Wednesday, July 14, 2004 at 10:00 a.m.

PROCEDURAL BACKGROUND

Merkel, by letter and subpoena, has scheduled depositions of Fernando Abeita and Nicholas Garcia for July 26, 2004. The attorney for the United States has received these discovery requests and represents that the Office will timely file a motion to stay discovery pending a ruling on the Defendants' Motion to Dismiss. Merkel's counsel has also advised that he wishes to depose John Gould, BIA Fire and Safety Specialist, in Boise, Idaho. Based on information and belief, the United States represents that Garcia is presently stationed in Ruidoso, New Mexico, or out of state fighting fires. Counsel for the United States represents that Merkel did not give him the names of the deponents nor consult about dates of their availability before receiving the subpoenas.

Merkel asks the Court to continue the hearing on the Defendant's Motion to Dismiss and the Defendant's Motion for Entry of Default Judgment, which the Court has scheduled for July 8, 2004 at 2:00 p.m. Merkel's counsel is not available to attend the hearing on July 8, 2004. Steven K. Sanders will be in trial July 6th through July 9th in a matter before the Honorable Jay Harris, District Judge, Fourth Judicial District. See Gonzales v. City of Las Vegas, No. 2002-262-CV. Donald R. Sears is scheduled to attend a deposition in Washington, D.C. on July 9th in Clark v. Roche, CIV No. 03-666 (D.N.M., filed June 2, 2003). Sears will be traveling on July 8, 2004.

The United States opposes vacating the July 8, 2004 hearing unless the Court stays discovery pending the Court's decision. In response to Merkel's e-mail request to vacate the hearing, and to take depositions, the Defendant's counsel replied via e-mail as follows:

From: Hamilton, Raymond
Sent: Tuesday, June 29, 2004 11:56 AM
To: 'SearsRo@aol.com'
Subject: RE: Merkel v. US

Due to the pending motion to dismiss, I will oppose all discovery until the motion on, which, by the way, should be July 8th. Because I believe very strongly that the United States' motion will be granted on the 8th, and therefore there will be no need for discovery, I will oppose vacating the hearing on the 8th.

An alternative is agree to stay discovery until a ruling on the motion, and give me a date certain in July that you will tell the Court we are both available. I am available 7/12-16, 7/19-23 and 7/29-30.

Further, the counsel for the United States represents that he is available for hearing before the discovery scheduled for July 26th. He is available any day, two consecutive weeks, 7/12-16, 7/19-23, for a hearing before the depositions scheduled on July 26th.

Thus, the United States offers alternative options. The United States agrees to vacate the

setting of July 8th if: (i) the Court schedules the hearing before the July 26, 2004 depositions that Merkel allegedly unilaterally set, or (ii) the Court stays discovery until the Court has ruled on the Defendant's Motion to Dismiss.

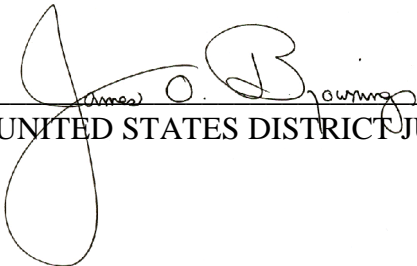
ANALYSIS

The United States asserts it will be a waste of resources, both in time and in money, to schedule discovery when a ruling on the United States' motion to dismiss is imminent. Thus, the parties may needlessly expend travel expenses, attorney fees, costs, deposition transcripts, attorney time, federal employee time, and other resources. The United States submits it is a reasonable compromise to vacate the hearing -- if neither of Merkel's two attorneys is available Thursday -- before Sears departs for Washington, D.C., and postpone all discovery until the Court and the parties determine the necessity for discovery.

While the United States is confident that the Court will grant its motions, and does not see any reason to delay the hearing on them, the Court has not read all the briefing and cannot be so certain without more work on them. In any case, the issue here is not whether the Court will grant or deny the motions, but whether the Court should vacate the hearing until Merkel's counsel can be present to participate. Because Merkel has presented good reasons why his counsel cannot be present for a hearing on July 8th, and the United States has not shown that continuing the hearing will unfairly prejudice it, the Court will continue the hearing.

The Court will reschedule the hearing for July 14, 2004. If that date is not convenient for Merkel, counsel should contact K'Aun Sanchez, the Courtroom Deputy, and set up another time. The Court will address the United States' request for a stay only if the Court does not hold a hearing before July 26th.

IT IS ORDERED that the Plaintiff's Motion for Continuance of Hearing is granted and the hearing on the Defendant's Motion to Dismiss and the Defendant's Motion for Entry of Default Judgment is rescheduled for Wednesday, July 14, 2004 at 10:00 a.m.



UNITED STATES DISTRICT JUDGE

Counsel:

Donald R. Sears, Jr.
Steven K. Sanders
Steven K. Sanders & Associates, L.L.C.
Albuquerque, New Mexico

Attorneys for the Plaintiff

David C. Iglesias
United States Attorney
Raymond Hamilton
Assistant United States Attorney
Albuquerque, New Mexico

Attorneys for the Defendant